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In the Supreme Court of the United States

OCTOBER TERM, 1996

CEDC FEDERAL CREDIT UNION, PETITIONER

v.

NATIONAL CREDIT UNION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 206(h) of the Federal Credit Union Act is unconstitutional or violates the Due Process Clause of the Fifth Amendment because it permits the National Credit Union Administration to place a federally-insured credit union in conservatorship *ex parte*, without notice and a prior hearing. See 12 U.S.C. 1786(h).

2. Whether the court of appeals correctly decided that judicial review of the National Credit Union Administration's decision was properly limited to the administrative record.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is unpublished but the decision is noted at 104 F.3d 351 (Table). The opinion of the district court (Pet. App. 7a-13a) is also unreported.

JURISDICTION

The summary order of the court of appeals was entered on September 26, 1996. The petition for a writ of certiorari was filed on December 26, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Credit Union Administration (NCUA) is an agency within the executive branch of the federal government, managed by a three-member board appointed by the President, charged with chartering, supervising, and regulating federal credit unions and insuring their share deposits pursuant to the Federal Credit Union Act (Act). 12 U.S.C. 1751 *et seq.* The NCUA has oversight responsibility for the nation's approximately 11,000 federally insured credit unions. The NCUA's power and authority with respect to credit unions, including the power to conserve or liquidate and to undertake enforcement actions, is similar to that of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision with respect to banks and savings and loan institutions. The primary way in which the NCUA carries out its supervisory role is through annual examinations to determine the financial condition of a credit union and its compliance with regulatory requirements. 12 U.S.C. 1756. Insurance is provided through the National Credit Union Share Insurance Fund, a fund established in the U.S. Treasury and managed by the NCUA Board. 12 U.S.C. 1783.

A federal credit union is a cooperative association of seven or more natural persons organized for the purpose of promoting thrift among its members and creating a source of credit. 12 U.S.C. 1752(1) and 1753. The functions of credit unions include, *inter alia*, receiving payments from their members in exchange for "shares"; making loans to their members; and investing funds in loans to members and in

certain low-risk securities and debt instruments. 12 U.S.C. 1757.

Under Section 206(h)(1)(A) of the Act, 12 U.S.C. 1786(h)(1)(A), the NCUA Board is authorized, "*ex parte* without notice," to appoint itself as conservator of any credit union insured by the Insurance Fund if "the Board determines that such action is necessary to conserve the assets of any insured credit union or to protect the [Insurance] Fund or the interests of the members of such insured credit union." The legislative history of Section 206(h) states that "[t]he [NCUA's] proposed conservatorship authority is similar to that available to the Comptroller of the Currency and Federal Home Loan Bank Board to prevent the liquidation of a credit union by allowing immediate control of operations with a goal of permitting the credit union to resume normal operations." S. Rep. No. 536, 97th Cong., 2d Sess. 51 (1982).

2. Petitioner, CEDC Federal Credit Union (Credit Union), was chartered as a federal credit union in 1973 to serve the employees of the Economic Opportunity Commission of Nassau County, Inc., its affiliates, and persons enrolled and participating in its neighborhood development programs. C.A. App. A72. It has approximately 400 members. *Ibid.*

The Credit Union "has had serious problems in the areas of management, sponsor relationships, and recordkeeping for an extended period of time. Recordkeeping problems date back to 1985 and the serious safety and soundness considerations of sponsor relationships date back to 1986." C.A. App. A72, A79. The Credit Union was assigned for special action by the NCUA in 1994 "because of its problems and lack of cooperation by the officials." C.A. App. A79. Since August 1993, the Credit Union has been given a

CAMEL[1] rating of "4." C.A. App. A79, A296. The NCUA allocated more than 700 hours in supervision and examination time to the Credit Union in the two years prior to the conservatorship. C.A. App. A79, A257.

On August 30, 1995, the NCUA issued *ex parte* without notice an order pursuant to 12 U.S.C. 1786(h)(1)(A) appointing itself conservator of the Credit Union. Pet. App. 8a. The order directed the Credit Union's Board of Directors and management to cease all activity on behalf of the Credit Union and to turn over and release to the agent for the conservator all materials such as its books, records, accounts, assets, and property. *Ibid.* The order indicated that the NCUA Board had determined that the conservatorship was necessary to conserve the assets of the Credit Union and to protect the Insurance Fund and the interests of the Credit Union members. C.A. App. A62-A65. Moreover, the Confidential Statement of Grounds for Conservatorship explained that the Order of Conservatorship was issued because of the Credit Union's violations of law, illegal loans to sponsor organizations, recordkeeping irregularities, and a reluctance by officials to provide infor-

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[1] The CAMEL rating is a uniform rating system which reflects the condition of a financial institution. A "1" is the highest or best rating and a "5" is the lowest or worst. A rating of "4" means that a credit union is in a "troubled condition" and has critical financial problems that could result in liquidation. 12 C.F.R. 701.14(b). See *First Nat'l Bank & Trust* v. *Department of Treasury*, 63 F.3d 894, 896 n.4 (9th Cir. 1995) (explaining CAMEL system), cert. denied, 116 S. Ct. 1875 (1996).

mation and to follow through on commitments. C.A. App. A67-A70.[2]

3. On September 15, 1996, the Credit Union filed suit in the federal district court seeking to enjoin the conservatorship imposed by the NCUA pursuant to Section 206(h)(3) of the Act. 12 U.S.C. 1786(h)(3). Pet. App. 3a. By memorandum and order, the district court determined that the NCUA's decision was to be evaluated on the basis of the administrative record and, further, that the decision was not arbitrary and capricious. The court also rejected petitioner's constitutional claims and denied petitioner's application for an injunction. Pet. App. 7a-13a.

The court of appeals affirmed. Pet. App. 1a-6a. The court concluded that the conservatorship statute is not an unconstitutional delegation of authority because "[c]hoosing remedies is well within the role of an administrative body." *Id.* at 4a. In addition, the court found that the Fifth Amendment Due Process Clause did not entitle petitioner to a hearing before appointment of a conservator and that the district court's post-appointment review of the administrative decision safeguards the Credit Union's due process interests. *Id.* at 4a-5a. Moreover, the court rejected as "meritless" petitioner's claim that the conservatorship constitutes a warrantless seizure in violation of the Fourth Amendment. *Id.* at 5a. Finally, the court did "not find [petitioner's] bad faith allegations even remotely persuasive" enough to allow the court

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[2] As conservator, the NCUA succeeded to all the rights, titles, powers, and interests of the members and officials of the Credit Union. 12 U.S.C. 1786(h)(8), 1787(b)(2)(A). Under the control of the NCUA, the Credit Union has remained open since the beginning of the conservatorship in September 1995.

to go beyond the administrative record. *Id.* at 6a. Thus, the court held that the decision to place the Credit Union in conservatorship was not "arbitrary [and] capricious" because there was "[a]mple evidence" in the administrative record that the NCUA's decision was proper. *Id.* at 5a-6a.

ARGUMENT

The court of appeals correctly rejected petitioner's arguments (Pet. App. 3a-6a) that the conservatorship statute is an unconstitutional delegation of authority, that the NCUA violated the Due Process Clause by selecting the conservatorship option under the Act, and that the district court improperly limited the scope of review to the administrative record. Moreover, there is no conflict in the circuits as to the appropriate scope of review by the district court.

1. Petitioner claims that the conservatorship section of the Act is unconstitutional because Congress did not "provide sufficient guidelines for the exercise of administrative agency discretion." Pet. 15. It further asserts that the statute unconstitutionally permits the NCUA to decide whether to invoke a procedure which affords a credit union due process protections[3]—or to invoke an *ex parte* conservatorship with no hearing and limited judicial review—for "the identical conduct by the credit union." *Ibid.* (emphasis deleted).

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[3] Section 206(b) of the Act authorizes the NCUA to terminate the insured status of the credit union after notice and a hearing to determine if the credit union is in an unsafe or unsound condition. 12 U.S.C. 1786(b). Section 206(e) authorizes the NCUA to issue a cease-and-desist order or an order to compel affirmative action to correct an unsafe or unsound condition after notice and a hearing. 12 U.S.C. 1786(e).

This Court has stated that "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Touby* v. *United States*, 500 U.S. 160, 165 (1991). As long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 409 (1928).

Furthermore, Congress may validly delegate to an agency the choice among several enforcement options. See *Air North America* v. *Department of Transp.*, 937 F.2d 1427, 1431-1432 (9th Cir. 1991). The agency then has the discretion to choose the remedy from among options explicitly left to its discretion by Congress. *Id.* at 1433; see *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984).

In the Act, Congress gave the NCUA the statutory authority to appoint a conservator as one of several methods of enforcing its statutory mandate to regulate federally insured credit unions and to protect the Insurance Fund and a credit union's members. The fact that the Act authorizes termination of deposit insurance, 12 U.S.C. 1786(a) and (b), and issuance of a cease and desist order, 12 U.S.C. 1786(e), in addition to the option of a conservatorship, 12 U.S.C. 1786(h), does not lessen the NCUA's authority to choose to appoint a conservator in appropriate circumstances. In 12 U.S.C. 1786(h)(1)(A)-(E), Congress has identified those situations in which a conservatorship may be appropriate: when it is necessary to preserve the assets of any insured credit union; when an insured

credit union agrees to a conservator; when the Attorney General notifies the NCUA that the credit union has been found guilty of certain criminal offenses; when there is a willful violation of a final cease and desist order; and when there is concealment of books, papers, records, or assets. See *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 185 (1973) ("where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence'") (quoting *American Power Co.* v. *SEC*, 329 U.S. 90, 112 (1946)).

Moreover, the conservatorship provision of the Act was enacted after the provisions permitting insurance termination and cease and desist orders. The legislative history of the conservatorship provision demonstrates the intent of Congress to allow the NCUA to appoint a conservator when it deems it necessary to do so. "This section * * * permit[s] the NCUA to exercise the option of taking possession and control of a federally-insured credit union when necessary * * * by allowing immediate control of operations with a goal of permitting the credit union to resume normal operations." S. Rep. No. 536, *supra*, at 51. Thus, as the court of appeals concluded (Pet. App. 4a), "that Congress left the NCUA with the discretion to choose between appointing a conservator or employing other remedies does not make the act unconstitutional."

2. The NCUA's exercise of its statutory authority to appoint a conservator without a prior hearing is fully consistent with the Due Process Clause. This Court has recognized that the Constitution does not require a pre-deprivation hearing "where some valid

governmental interest is at stake that justifies postponing the hearing until after the event." *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 53 (1993). See *FDIC* v. *Mallen*, 486 U.S. 230, 240 (1988). As the court of appeals noted (Pet. App. 4a), the rationale behind the government's interests in protecting bank depositors and the public from unsound banking practices, and in protecting the federal treasury from unnecessary insurance claims by depositors resulting from bank failures, applies to the government's protection of credit unions. These interests "justif[y] the appointment of a conservator without prior notice." *Ibid.* See *Fahey* v. *Mallonee*, 332 U.S. 245, 253-254 (1947) (conservatorship of savings and loan).[4]

3. Petitioner claims that a conflict in the circuits exists as to the scope of review a district court should apply. In petitioner's view, the Second Circuit's opinion in this case limits judicial review to the administrative record, while in the Sixth Circuit the reviewing court will conduct evidentiary hearings. Pet. 19-20. There is, however, no circuit conflict on this issue.

In general, judicial review of an agency decision is ordinarily restricted to the record compiled by the administrative agency. *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam). Every court of appeals that

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[4] Accord *First Nat'l Bank & Trust Co.* v. *Department of Treasury*, 63 F.3d at 896; *Franklin Sav. Ass'n* v. *Director, OTS*, 934 F.2d 1127, 1140 (10th Cir. 1991), cert. denied, 503 U.S. 937 (1992); *First Fed. Sav. Bank & Trust* v. *Ryan*, 927 F.2d 1345, 1357-1358 (6th Cir.), cert. denied, 502 U.S. 864 (1991); *Haralson* v. *FHLBB*, 837 F.2d 1123, 1126-1127 (D.C. Cir. 1988); *Woods* v. *FHLBB*, 826 F.2d 1400, 1411-1412 (5th Cir. 1987), cert. denied, 485 U.S. 959 (1988).

has addressed the issue, including the court below (Pet. 5a-6a), has concluded that the scope of review is no different in cases involving a regulator's decision to appoint a conservator or receiver for a troubled financial institution. See *First Nat'l Bank & Trust*, 63 F.3d at 897-899; *Franklin Sav. Ass'n*, 934 F.2d at 1140; *Woods*, 826 F.2d at 1409; *Guaranty Sav. & Loan* v. *FHLBB*, 794 F.2d 1339, 1342 (8th Cir. 1986).

The Sixth Circuit has endorsed this position in a decision involving the *ex parte* appointment of a receiver at a savings and loan association. *Marietta Franklin Securities Co.* v. *Muldoon*, No. 93-3432, 1994 WL 399550, at *2 (6th Cir. Aug. 1, 1994) (unpublished) (per curiam), noted at 30 F.3d 134 (Table). In *Marietta*, the Sixth Circuit "agree[d]" with three circuits (Fifth, Eighth, and Tenth) that the scope of review is "confined to the administrative record." *Ibid.* The court of appeals there found that the district court had provided "more process than * * * was due" by allowing the savings and loan institution to admit evidence that was not included in the administrative record. *Id.* at *3. In *Bingham* v. *National Credit Union Administration Board*, 927 F.2d 282 (6th Cir.), cert. denied, 502 U.S. 817 (1991), relied on by petitioner (Pet. 19-20), the district court did hold an evidentiary hearing, but the propriety of that hearing was not an issue on appeal.[5]

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[5] Likewise, the other cases relied on by petitioner (Pet. 20) are either district court decisions or court of appeals' decisions which, like *Bingham*, affirmed decisions of the district court where some form of evidentiary hearing was held but where the appropriate scope of review was not an issue before the appellate court.

Post-appointment judicial review based on the administrative record is "adequate to assure against the risk of mistaken deprivations." *Woods*, 826 F.2d at 1411. The district court is able to make that determination by reviewing the administrative record, which sets out the agency's justifications for its action. *Ibid.*; *Franklin Sav.*, 934 F.2d at 1140; *Haralson*, 837 F.2d at 1126-1127. Here, the court of appeals noted as follows:

> The Credit Union grossly exceeded NCUA regulations by concentrating its loans to specific members; excessive loans were made to the Credit Union's sponsors without proper application, authorization, or indication of ability to repay; security listed for sponsor loans, often just an account number, was crossed-out and substituted and lacked indication as to what part of the security was pledged; recordkeeping problems continued for several years; and the Credit Union had shown a reluctance to provide NCUA officials with information.

Pet. App. 5a-6a. Thus, the court below properly concluded that the record amply supported the district court's determination that the conservatorship was proper. *Id.* at 5a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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